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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 274

FORREST PARROTT and DONALD PARROTT,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Forrest Parrott and Donald Parrott, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 20, 1970.

Opinion Below

The United States Court of Appeals for the Second Circuit affirmed the judgment entered against petitioners in the United States District Court for the Southern District of New York. This opinion of the Court of Appeals has not yet been officially reported; a copy thereof is appended to this petition as Appendix A. The order of the United States

Court of Appeals denying petitioners' motion for a rehearing has not been officially reported; this order was entered on May 19, 1970; a copy thereof is appended to this petition as Appendix B.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on the 20th day of April, 1970. On May 4, 1970, petitioners applied for a rehearing in the United States Court of Appeals. On May 19, 1970, this petition for a rehearing was denied. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Whether petitioners were denied due process and a speedy trial in violation of their Fifth and Sixth Amendment rights, Rule 48(b) of the Federal Rules of Criminal Procedure, and the doctrine of this Court in *Dickey* v. *Florida*, —— U.S. —— (May 25, 1970).

2. Whether the commingling of civil and criminal proceedings involving petitioners and pressing the civil proceedings while concealing the intent to prosecute criminally deprived petitioners of their Fifth Amendment rights and violated "civilized standards of procedure."

3. Whether the conviction of petitioner Donald Parrott was obtained through guilt by association with his father and employer, in violation of this Court's doctrine in *Ingram* v. *United States*, 360 U.S. 672 (1959), and on the prosecutor's highly prejudicial summation to the jury.

4. Whether this Court, as judicial supervisor of the administration of criminal justice in the federal courts, should correct a serious error made by the Court of Appeals as to the admission in evidence of certain letters offered under the business records exception to the hearsay rule, 28 U.S.C. §1732.

Statutory Provisions

Fifth Amendment to the United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Sixth Amendment to the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

Rule 48(b) of the Federal Rules of Criminal Procedure

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Title 28, United States Code, Section 1732(a)

> "In any court of the United States . . . , any writing or record . . . made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of any such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such busi-

ness to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

Statement of the Case[1]

An indictment in 77 counts, naming ten defendants, was filed on March 10, 1966. Petitioner Forrest Parrott ("Forrest") was tried on Counts 1, 2, 6, 10, 54-56 and 60-66 which charged him with: (1) conspiracy in violation of Title 18, United States Code, Section 371, to sell unregistered securities of Petron Corporation ("Petron") and to sell such securities by fraud and to perpetrate a mail fraud; (2) selling securities by fraud in violation of Title 15, United States Code, Sections 77q and 77x and Title 18, United States Code, Section 2; and (3) selling unregistered securities in violation of Title 15, United States Code, Sections 77e(a)(1) and 77x and Title 18, United States Code, Section 2. Donald Parrott ("Donald"), Forrest's son, was tried on only one count of the indictment, the conspiracy count.

The trial commenced on June 2, 1969, and on June 17, 1969, the jury returned a guilty verdict on all counts as to which Forrest was tried and on the conspiracy count as to Donald. On October 15, 1969, Forrest was fined $10,000, was given a three-year suspended sentence and was placed on probation for a period of one year. Donald was fined $1,000, the imposition of a prison sentence was suspended, and he was placed on probation for one day. The fines have been paid.

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[1] The uncontroverted facts are also stated in petitioners' motions to set aside the verdict.

On April 28, 1961, the Securities and Exchange Commission began an investigation in connection with the sale of stock of Hydramotive Corporation ("Hydramotive"). In September of 1961, one Frantz, an SEC investigator, appeared without prior notice at Donald's house in Colorado and questioned him for several hours about the affairs of Hydramotive and its transfer agent, and about Petron and Ampet Corporation (a parent of Petron). Frantz asked Donald questions about ownership of and transactions in stock of these entities by him and members of his family, including his father and employer Forrest. Frantz told Donald to bring all his records relating to these matters and to various other corporations and companies to the SEC office in Denver, saying that he would subpoena them if he had to, but that he did not think Donald and his family would want to go through such an ordeal. Frantz's threat that Donald's family would suffer if the records were not relinquished was clear and unmistakable.

Accordingly, on September 11, 1961, Donald yielded to Frantz's threat and surrendered to Frantz voluminous records relating to ownership of, and transactions in, stock of Petron, Ampet and Hydramotive by petitioners. At no time was Donald advised that he did not have to answer Frantz's questions, that anything he said could be used against him, or that he was entitled to consult an attorney. With the information thus obtained, the Government launched a complex maze of proceedings against the Parrotts.

Thus, on October 23, 1961, Donald was formally interrogated in the Denver office of the SEC. On October 30, 1961, Forrest notified the SEC at a hearing that both of

his attorneys on securities matters (Messrs. Baldwin Bane and Simon Peavey) were in ill health, each having had a stroke. The SEC told Forrest that they knew of Bane and his stroke. Bane told Forrest the SEC was thus "on notice," so that if it reached an "accusatory" stage, it would be obligated to advise Forrest immediately so that he could take a deposition which could be used in the event he or Peavey were unavailable as witnesses. There ensued from November of 1961 to March of 1962 a sweeping SEC investigation of Ampet and Petron, in which many persons were interrogated and the books of several entities were examined. Many of these persons were either co-defendants or Government witnesses in the District Court below. Among the entities whose books were examined were Petron and Ampet. The striking similarities among the civil and criminal cases were noted with great detail in petitioners' motions to set aside the verdict and their briefs on appeal.

On December 13, 1961, the first of several court actions involving the Parrotts began when the SEC filed a complaint in the United States District Court for the Western District of Oklahoma seeking an injunction against the Parrotts and others, forbidding sales of Hydramotive stock. The Parrotts' offer to escrow their stock was refused. On March 23, 1962, extensive interrogatories were served on the Parrotts, and answers thereto were filed in April and July of 1962. On August 2, 1962, the SEC deposition of Forrest took place, and Donald was deposed the following day. Trial began on July 16, 1963, on which date Donald testified. Forrest testified on July 19 and 20, 1963, and his testimony included answers to questions by the Government relating to Petron, over objection. On December

30, 1963, the Oklahoma District Court permanently enjoined the Parrotts and others from violating the securities laws.[2]

Still another action was begun by the Government on March 9, 1962, when the SEC filed a complaint in the United States District Court for the District of Colorado, seeking an injunction against the Parrotts and others relating to sales of stock in Ampet and Petron. This is the civil version of the present case.[3] The complaint in this Colorado action states that from April 1, 1961 to the date thereof, the defendants (including the Parrotts) were selling stock of Ampet and Petron and that no registration statement had been filed or was in effect. On April 9, 1963, the Government served interrogatories on all defendants in that case and, on August 21, 1963, the Parrotts filed answers to those interrogatories.

The Parrotts were then ignorant of the facts as explained, *infra,* that (i) a criminal investigation into Petron began on January 29, 1962, and (ii) on November 13, 1962, a criminal reference report had been forwarded to the United States Attorney for the District of Columbia recommending criminal prosecution against the Parrotts and others involved in the Oklahoma Hydramotive case, and (iii) on July 31, 1963, the SEC recommended to the United States Attorney for the Southern District of New York that the Parrotts and others be prosecuted for violating the securities laws in connection with Ampet and Petron—the very subject of the Colorado civil case.

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[2] *Securities and Exchange Commission* v. *Bond and Share Corporation, et al.*, 229 F. Supp. 88. This case is now pending before the United States Court of Appeals for the Tenth Circuit.

[3] See p. 11, *infra.*

From November to December of 1963, the SEC took the deposition of Fred Erdman, the assistant to Simon Peavey, *supra* (Forrest's attorney and business adviser). There were also several other discovery and deposition proceedings in that case involving witnesses who testified for the Government in the District Court in the instant case. On October 14, 1964, Forrest signed a consent decree in that case.

On July 2, 1962, the SEC instituted an administrative proceeding in Washington, D. C.[4] to revoke the broker-dealer registration of Walter A. Raleigh, d/b/a Raleigh Securities Company. The SEC had alleged violations in connection with sales of Ampet, Petron and Hydramotive stock. Forrest was named as a "probable cause." On November 12, 1963, one Alfred Brehmer, a co-defendant in the instant case, was called as a witness. Robert C. Prem, appearing on behalf of Raleigh Securities Company, and Mr. Bliss, appearing for the SEC, engaged in the following colloquy:

> "Mr. Prem: The Division has not instituted any criminal proceedings against any of the persons—
>
> Mr. Bliss: No. We do give them constitutional warning, as we say, so the witness may be informed.
>
> Hearing Examiner Swift: That's my practice in all situations like this, Mr. Prem.
>
> Now proceed with the examination."

Not only did the SEC falsely deny its prior institution of criminal proceedings—the D. C. case and the submission of a criminal reference report in this very case—but it de-

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[4] This proceeding was held in the District of Columbia and not in Colorado as the Court of Appeals erroneously stated in its opinion (see Appendix A, p. 42).

liberately concealed the presence of a representative of the Department of Justice who was assigned to preparation of criminal charges (see Point II, *infra*, p. 24, and Appendix A, p. 45).

The hearing was commenced on August 8, 1962, and the Parrotts were subpoenaed to appear. They failed to do so and asserted the hearing should be postponed until conclusion of the Oklahoma and Colorado actions, *supra*. On May 20, 1964, on the Government's motion, the Parrotts were held in contempt and were directed to purge themselves by testifying. Forrest commenced his testimony on June 2, 1964 and testified on nine days that month and in July. His testimony runs over 800 pages, much of it pertaining to Petron and matters directly relating to the instant case. Donald testified on June 1, 1964, and his testimony covers 158 pages. Neither of the Parrotts was warned that criminal prosecutions had long since been referred to the Department of Justice in both the instant case and the Hydramotive (Oklahoma) matter,[5] nor was any attempt made before they testified to correct the record with regard to the false representation that no criminal proceedings had been initiated.[6] On December 9, 1964, the SEC accepted an offer in settlement by Forrest as a party in which, without admitting or denying he was a person associated with a broker or dealer, he consented to an order barring him from becoming one or being so associated. On June 2, 1965, this administrative proceeding was terminated by stipulation.

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[5] See p. 10.

[6] See Point II, *infra*, p. 24.

In the meantime, the Governmental apparatus for the institution of criminal proceedings against the Parrotts had been put into action. The Government has acknowledged that the investigation into alleged crimes involving Petron stock began on January 29, 1962. On November 13, 1962, the SEC forwarded a report to the United States Attorney for the District of Columbia in which it recommended that a criminal prosecution be instituted in the District of Columbia against the Parrotts and others involved in the Oklahoma Hydramotive case.[7] On July 31, 1963, the SEC recommended to the United States Attorney for the Southern District of New York that the Parrotts and others be prosecuted for violating the securities laws in connection with Ampet and Petron—the subject of the Colorado civil case, *supra*. The SEC referred its files to the United States Attorney. However, the Parrotts were never advised of the reference for criminal proceedings against them.

On September 10, 1964, an indictment was filed in the United States District Court for the District of Columbia against the Parrotts and others regarding sales of Hydramotive stock. However, on December 6, 1965, the indictment in the District of Columbia was dismissed on the grounds that (i) the Parrotts' rights to due process had been violated by the extensive civil pre-trial discovery which the SEC had obtained, and (ii) their right to a speedy trial had been denied because of the long delay in returning an indictment. *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965).

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[7] Apparently, criminal prosecution had been planned even earlier, as the papers forwarded on November 13 were dated in September of 1962.

On January 5, 1966, the Government appealed this dismissal of the District of Columbia indictment. It was only on January 25, 1966 that the within case was first presented to a grand jury in the Southern District of New York. On March 10, 1966, almost five years after the alleged crime, the indictment in this case was returned.[8] Thus, no proceeding was commenced before the grand jury in the Southern District of New York until *after* the indictment in the District of Columbia had been dismissed. In May of 1966, after it had obtained an indictment in the Southern District of New York, the Government moved to dismiss its appeal from the dismissal of the District of Columbia indictment for the stated reason that the Solicitor General had determined not to authorize its further prosecution.

When Forrest was subpoenaed before the grand jury which returned the instant indictment, he was shown certain financial reports of Petron which were the identical ones which had been introduced in the above-enumerated civil proceedings. The questions asked him were the same as those previously asked him in those other proceedings. In fact, the indictment herein copies the complaint in the Colorado civil action, *supra*, verbatim in pertinent part.

In August and September of 1966, the Parrotts moved to dismiss the indictment herein because of unnecessary delay in its return. However, on February 20, 1967, at the request of the Government, to which Forrest consented, the case was removed from the calendar, and thus the Parrotts were led to believe that the case would never be tried. It was put back on the calendar in late August of 1968.

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[8] The alleged offenses regarding the sale of Petron stock occurred during the period from March, 1961 to August 10, 1961.

On February 14, 1969, the District Court denied the motion to dismiss the indictment and for a change in venue, but it said that the motion was "denied without prejudice to renewal at the trial if the defendants Parrott can then show sufficient prejudice by reason of the SEC proceedings or the delay in bringing them to trial." The District Court said that the motion to suppress evidence and its fruits arising out of the commingling of the civil and criminal cases "would most appropriately be made to the trial judge." It was not until March 24, 1969 that the District Court assigned the case for trial, and finally, on June 2, 1969, the trial was begun.

During the lengthy delay, all of the defense witnesses had died and thus the prejudice to the defense could not be overcome. Petitioners, at the trial and in their motions to set aside the verdict, proffered proof as to what the deceased witnesses would have testified. The proffers are too voluminous to repeat in this Petition, but the witnesses and a capsule summary of their proposed testimony are as follows:

(a) Baldwin Bane, Esq., Forrest's attorney and one of the foremost experts in the securities field, who died on May 24, 1962, would have testified: (i) as to the advice he gave Forrest that his sales of Petron stock were exempt from registration, (ii) that Forrest was not a controlling person behind the alleged corporate nominees, and (iii) that he knew of Forrest's offer on October 30, 1961 to submit the Petron matter to the SEC for its determination regarding any possible violation of SEC rules.

(b) Simon F. Peavey, Jr., Esq., Forrest's New York attorney and business adviser, who died on March 18, 1963,

would have testified as to the details of Forrest's business affairs and would have completely refuted the testimony of the principal Government witness[9] against Forrest.

(c) Fred Erdman, who died on November 23, 1965, an assistant of Mr. Peavey, would have corroborated Peavey's testimony. Erdman had agreed with Forrest, after Peavey died, to undergo a deposition, but there was no need for such deposition because the United States District Court for the District of Columbia had indicated that the indictment there would be dismissed, and Forrest then had no knowledge of any criminal proceeding in the Southern District of New York.

(d) Elizabeth McIlvaine, who died on September 8, 1967, was a good friend of Peavey and was often present when Peavey was discussing these various matters with Forrest. Forrest saw her quite often during 1967, when they reviewed the facts to prepare for her testimony in this case. Again, there was no need for a deposition because the case had been marked off the calendar and it was only afterwards that Miss McIlvaine died.

(e) Chester Wyse, who died in November of 1963, was a Toronto accountant familiar with many of the business affairs of Forrest. He could have helped rebut the testimony of Naidich, *supra*.

(f) John J. Farrell of the Farrell Securities Company of New York died in February of 1963. He had sold some Petron shares, and his death was noted as a prejudicial factor by the United States District Court for the District of Columbia when it dismissed the indictment against the

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[9] One Arnold Naidich, a disbarred New York attorney with a record of several convictions for violations of the securities laws.

Parrotts. 248 F. Supp. 196 at 205, 210-211. In fact, the Parrotts' proffers in this case were quite similar to those accepted in the prior Parrott case in the District of Columbia.

REASONS FOR GRANTING THE WRIT

POINT I

Petitioners were denied due process and a speedy trial in violation of their Fifth and Sixth Amendment rights and Rule 48(b), F.R. Crim. P. Further, *Dickey* v. *Florida*, —— U.S. —— (May 25, 1970), requires that their convictions be set aside.

This case involves alleged offenses which occurred in 1961, a criminal reference report in 1963, an indictment in 1966 and a trial in 1969. These extraordinary delays caused the Honorable Inzer Wyatt, District Judge of the Southern District of New York, to say of this case on March 24, 1969, before sending it out for trial:

> "This is one of the most disgraceful cases in the whole courthouse. It is a blot on the administration of criminal justice that it has been so delayed."

The reasons for these delays were that: (1) the Government was waiting for the completion of the civil proceedings, *supra*,[10] (2) the Government admitted in open court that it was too busy with other cases, (3) the Government went "forum shopping" in that the instant indictment was not returned until after the dismissal of the District of Columbia indictment, and (4) after indictment and after being confronted with a motion to dismiss for unnecessary

[10] See also Point II, *infra*.

delay, the Government requested that this case be marked off the trial calendar.

The result was that in the interval before trial all of petitioners' witnesses died. In their motions to set aside the verdict and in their briefs on appeal, petitioners stated that obvious prejudice exists in the fact that memories fade and evidence is lost with the passing years, especially in view of the fact that petitioner Forrest Parrott was 73 years old, had suffered a heart attack and a stroke, and his burden of anxiety had increased with each passing year. Forrest Parrott died on May 17, 1970—months after his conviction.

An examination of the aforesaid reasons for the delays reveals:

(1) *The civil proceedings*—The Court of Appeals noted the Government's contentions first that the Parrotts brought on the pre-indictment delay themselves by vigorously opposing the civil actions to the point of requiring the use of contempt as a means of requiring their cooperation, and second, that the complex nature of the case required time to unwind so that a criminal reference report was not possible until July, 1963. The first of these reasons was rejected by the Court of Appeals as being "of dubious force." As to the second reason, petitioners do not dispute that time is needed to investigate criminal charges in securities cases. This is not at issue, for the criminal reference report was made in July of 1963. The other proceedings (the civil proceedings in Oklahoma, Colorado and Washington, D. C. and the criminal reference report in Washington, D. C.) all had been brought before then. Thus, how much time was needed for the instant case when similar proceedings had long before been brought elsewhere?

Additionally, as Judge Gasch noted in *United States* v. *Parrott, supra,* 248 F. Supp. at 201-202, the civil proceedings were unnecessary to protect any public interest since the Parrotts had offered to put all questioned stock in escrow as early as February of 1962. Judge Gasch further noted:

> ". . . it appears that the Government has made a deliberate choice to hold the criminal prosecution in abeyance. As a result of that choice, delay has ensued and the fruits of the civil proceedings have undoubtedly aided the Government with respect to the criminal prosecution. Conversely, the choice has damaged and prejudiced the defendants."

(2) *The Government was preoccupied with other cases—*

In *Dickey* v. *Florida,* —— U.S. —— (May 25, 1970), this Court, by Mr. Chief Justice Burger, said:

> "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality on the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases. Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial."

In the instant case, as the Court of Appeals acknowledged,[11] the Government tried to justify the pre-indictment

[11] Appendix A, p. 42.

delay by claiming that it was tied up with other cases. If, as this Court held in *Dickey, supra,* it is "the duty of the charging authority . . . to provide a prompt trial," then this excuse is clearly insufficient.

The excuses offered for the delays by the numerous Assistant United States Attorneys who were charged with and ignored this case are in affidavits constituting part of the record herein. The first Assistant, who handled this case from September 11, 1963 until June 15, 1964, said: "The reason that I delayed active consideration of the Ampet-Petron case, and the possible initiation of a grand jury investigation, was my physical inability to find the time to do so." The second Assistant, who handled this case from June 15, 1964 until late 1965, said: "What prevented me from actively working on the Ampet-Petron case with a view to its possible presentation to the grand jury, was simply the lack of time to do so." The third Assistant acknowledged that this case was marked off the calendar on February 20, 1967 and that he was busy with another case. On January 10, 1968, this case was reassigned to a fourth Assistant, who tried the case a year and a half later.

The above excuses constitute an admission of negligent delay, which violates the Speedy Trial Clause of the Sixth Amendment, as Mr. Justice Brennan noted in his concurring opinion in *Dickey, supra.* Such excuses have been held to be "constitutionally deficient." *United States* v. *Perez,* —— F. Supp. —— (S.D.N.Y. 2/13/70).

(3) *Forum shopping by the Government*—The Court of Appeals overlooked the obvious plan of delay by the Gov-

ernment. It parenthetically noted[12] the fact that the indictment herein was not sought and returned until after the District of Columbia indictment was dismissed. When the indictment herein was returned, then the Government dropped its appeal from the dismissal of the District of Columbia indictment. The only conclusion that can be drawn from such state of facts is that the Government, busy with other cases, saw no reason to interrupt its other work as long as the Parrotts were under indictment elsewhere; when that indictment was dismissed, the Government went "forum-shopping."

Thus, the Parrotts, residents of Colorado, were tried in New York, after having faced proceedings in Oklahoma, Colorado, and the District of Columbia.

(4) *The Government's request to take case off trial calendar*—The Court of Appeals said that the claim of post-indictment delay must be held to have been waived. The first reason given was that "there was no demand for speedy trial." This is clearly incorrect, for the docket entries[13] showed the filing in 1966 of a motion to dismiss the indictment because of unnecessary delay. This motion was made shortly after the indictment was returned and constitutes a demand for a speedy trial. While petitioners did not oppose the Government's request to mark the case off the trial calendar in February, 1967, by then the Government was aware of petitioners' demand for a speedy trial. Even under prior Court of Appeals decisions, waiver is only one factor to be considered. *United States* v. *Simmons*, 338 F.2d 804 (2d Cir. 1964), *cert. denied*, 380 U.S.

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[12] Appendix A, p. 42.

[13] Reprinted in the Appendix on appeal.

983 (1965); *United States ex rel. Von Cseh* v. *Fay*, 313 F.2d 620 (2d Cir. 1963).

The fact is that the last of petitioners' witnesses to die was not deposed because the case had been marked off the calendar.

On March 21, 1969, the Honorable Inzer Wyatt, District Judge, cast serious doubt about even attempting to assess blame for the delays:

> "But it must be recognized on all sides that the indictment at bar is an especially dreary and depressing example of too great delay in the administration of criminal justice. There is no reason to attempt any assessment of blame if indeed such could be done at this remove."

As to the "quite a long" pre-indictment delay, the Court of Appeals held that petitioners did not show sufficient prejudice and that prejudice is not to be presumed from pre-arrest delay within the statutory period.[14] However, in his concurring opinion in *Dickey, supra,* Mr. Justice Brennan noted that the courts are divided in their conclusions regarding prejudice[15] and that:

> "When the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary

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[14] Contrary to Judge Gasch's holding on essentially the same facts in *United States* v. *Parrott, supra,* 248 F. Supp. at 203.

[15] Indeed, the courts within the Second Circuit are themselves divided not only on this point but on other issues involving the right to a speedy trial. *Cf.* Appendix A, *infra,* with *United States* v. *Mann,* 291 F. Supp. 268 (S.D.N.Y. 1968); *United States* v. *Roberts,* 293 F. Supp. 195 (S.D.N.Y. 1968); *United States* v. *Richardson,* 291 F. Supp. 441 (S.D.N.Y. 1968); *United States* v. *Ketchum,* —— F. Supp. —— (S.D.N.Y. 8/11/69); *United States* v. *Chin,* 306 F. Supp. 397 (S.D.N.Y. 1969); *United States* v. *Skinner,* 308 F. Supp. 1221 (S.D.N.Y. 1969); *United States* v. *Perez,* —— F. Supp. —— (S.D.N.Y. 2/13/70).

to assume prejudice once the accused shows that he was denied a rapid prosecution."[16]

All of petitioners' witnesses were alive on January 29, 1962, which is when the SEC had reached the accusatory stage against petitioners. These witnesses would have negatived the intent necessary for conviction and would have shown that Forrest Parrott was acting under the advice of expert counsel. The Government's contention that its case was strongly documentary is irrelevant, for petitioners' case was *not* mainly documentary but consisted of live witnesses—every one of whom died in the eight-year interval from alleged offense to trial. It is no answer to say petitioners could have taken the depositions of these witnesses, for petitioners were never advised that criminal investigations had been commenced, and, in fact, such information was deliberately withheld from them.[17] The fact that the SEC took the deposition of one of these witnesses, Erdman, is hardly the equivalent of petitioners being able to take his deposition in a subsequent criminal case then being secretly prepared.

The Court of Appeals said that "the deaths of prospective witnesses Bane and Peavey [attorneys] came before

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[16] He also said: "Although prejudice seems to be an essential element of speedy trial violations, it does not follow that prejudice —or its absence, if the burden of proof is on the government—can be satisfactorily shown in most cases. Certainly, as the present case indicates, it can be established in some instances. It is obvious, for example, if the accused has been imprisoned for a lengthy period awaiting trial, or if the government has delayed in clear bad faith. But concrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses."

[17] Point II, *infra*.

any realistic trial date." [18] Reference was made to *United States* v. *Parrott, supra,* 248 F. Supp. 196, where the delay was not as long as in the instant case. This prior *Parrott* case was distinguished by the Court of Appeals on the basis that "The lawyer on whose advice Parrott claimed to have relied in the Hydramotive promotion, one Heidenrich, would have been available at a reasonably prompt trial, which led to the ruling that the delay there was prejudicial." [19] However, in the prior *Parrott* case, the Parrotts did not claim to have relied on Heidenrich, for he was not their lawyer and that case recited that the proffer as to Heidenrich was that "He did not know the defendants Forrest Parrott and Donald Parrott." 248 F. Supp. at 208.

The Court of Appeals overlooked the proffer presented by petitioners as to other witnesses who would have been available at a realistic trial date (Erdman, Farrell, and McIlvaine). As Judge Gasch noted, it is not the Government's prerogative to select witnesses for the Parrotts, "and when the Government's delay produces a result that amounts to such selection, the Court will consider the defendants to have been prejudiced." [20] These witnesses—and not the Government—are the best source of their own testimony.

Justice Brennan further said of this Court's opinion in *Dickey*:

> "I do not read the Court's opinion as deciding that in post-*Klopfer* cases (1) the defendant can challenge

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[18] But Forrest Parrott had notified the SEC in 1961 that these attorneys of his were in ill health in order to put it on notice so he would, if necessary, be able to take their depositions.

[19] Appendix A, p. 44.

[20] 248 F. Supp. at 205.

only delay occurring after his arrest; (2) he is not entitled to speedy trial unless he demands it at the time of the delay;[21] (3) he must prove actual prejudice, or (4) the delay must be deliberately caused by the government. It is timely to note that the Court has as yet given scant attention to these and other questions essential to the definition of the speedy trial guarantee."

These same basic questions about the scope and context of the speedy trial guarantee are presented by the instant case. As Justice Brennan noted in summary:

"These comments provide no definitive answers. I make them only to indicate that many—if not most—of the basic questions about the scope and context of the speedy trial guarantee remain to be resolved. Arguments of some force can be made that the guarantee attaches as soon as the government decides to prosecute and has sufficient evidence for arrest or indictment; similar arguments exist that an accused does not lose his right to speedy trial by silence or inaction, that governmental delay which might reasonably have been avoided is unjustifiable, and that prejudice ceases to be an issue in speedy trial cases once the delay has been sufficiently long to raise a probability of substantial prejudice. Insofar as these arguments are meritorious, they suggest that the speedy trial guarantee should receive a more hospitable interpretation than it has yet been accorded."

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[21] Justice Brennan seriously questioned the view, accepted by the Court of Appeals below, that an accused loses his right to a speedy trial by silence or inaction.

POINT II

Commingling the civil and criminal proceedings and pressing the civil proceedings while concealing the intent to prosecute criminally deprived petitioners of their rights under the Fifth Amendment and violated "civilized standards of procedure." This Court is thus presented with issues of first impression which it expressly left open in *United States* v. *Kordel*, 397 U.S. 1 (1970).

Petitioners previously raised this issue of the commingling of the civil and criminal proceedings and it was resolved in their favor. *United States* v. *Parrott, supra*, 248 F. Supp. at 199. There the court phrased the issue as follows:

> "May the government by bringing a parallel civil proceeding avail itself of the almost unlimited opportunity that a civil litigant has to take extensive depositions of the other party to the civil proceedings and then utilize the fruits of this interrogation, as well as seizures without a warrant of books and records of certain of these defendants, in the preparation of the criminal case?"

That court answered in the negative:

> "The Court holds that the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution."

In so answering, Judge Gasch of the United States District Court for the District of Columbia took account of the fact that at the Oklahoma civil trial, petitioners were not in-

formed of the fact that the SEC had recommended criminal prosecution, nor were they warned of their constitutional rights against self-incrimination. Indeed, the SEC had initiated two prosecutions by submitting criminal reference reports to two United States Attorneys. Petitioners answered interrogatories after the two criminal reference reports had been forwarded. It was further noted that at the administrative hearing in Washington, D. C. where petitioners testified, the identity of a Government attorney who was assigned to preparation of criminal charges and who attended the hearing and listened to petitioners' testimony was "purposefully concealed." The Court of Appeals[22] condemned such use by the Government of "cloak and dagger games" in attempting to hide from petitioners the fact that criminal proceedings were contemplated. However, the Court of Appeals overlooked what Judge Gasch called "a more significant action on the part of the Government," *i.e.*, that "The SEC attorney denied that criminal proceedings had been instituted against any of the persons involved."[23]

At the trial of the instant case, the Government admitted that it "has never attempted to sift out, if it were possible to sift out, the question of possible derivation of evidence at this trial from the documents delivered in 1961."[24] Thus, the Government has not even attempted to meet its burden of proof with regard to showing that it did not use the evidence and its fruits obtained in the civil proceedings.

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[22] See Appendix A, p. 45.

[23] 248 F. Supp. at 199.

[24] The SEC's initial investigation was into Hydramotive. It found out about Petron and the ownership of stock therein through its seizure in 1961 of books and records in Donald Parrott's possession and by questioning him without advising him of his rights.

The Government's claim that it did not use the testimony of petitioners in the earlier civil proceedings in its case in chief or in cross-examination of Forrest Parrott is unimportant. Such testimony was obviously used to find evidence and names of witnesses so that petitioners could be bypassed by the time of the trial. The similarity between the Colorado civil case and the indictment herein, and between the earlier civil proceedings and the questions asked Forrest Parrott before the grand jury in the Southern District of New York, have previously been noted. In fact, two of the principal Government witnesses at the trial admittedly refreshed their recollection from testimony they had given in the previous administrative hearing in Washington, D. C.[25]

There was, as Judge Gasch noted, no need for the civil proceedings; for petitioners had offered to put their stock in escrow and to abide by the determination of the SEC. 248 F. Supp. at 201-202. Thus, if the Government had been acting in good faith, it would have accepted this escrow offer, and then, if it so desired, presented any violations to a grand jury. The grand jury's subpoena power could have been used to obtain additional information. By concealing the preparation and forwarding of the two criminal reference reports during the civil proceedings, petitioners were kept from resorting to normal judicial procedures to protect themselves. As Judge Gasch put it, "the danger of prejudice, flowing from testimony out of a defendant's mouth at a civil proceeding is even more acute when he is

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[25] These witnesses are Messrs. Vance and Brehmer. Vance said: "Well they said I could look over my testimony." Brehmer saw "a transcript in the last few days." The prejudice resulting from the prior civil proceedings was compounded by the Government at the trial herein when it questioned Vance about the effect of "an injunction obtained by the SEC 1962, March 9th."

unaware of the pending criminal charge." Judge Gasch further noted:

> "In the instant case, these defendants are confronted with a situation in which they had no notice that the Government would subsequently bring an indictment against them. It seems clear that . . . the criminal matter should first be disposed of, certainly prior to the taking of civil depositions. This proposition is much clearer in the instant case wherein the Government has not only seized evidence belonging to these defendants—some of it without search warrants—but has also taken extensive depositions and testimony in conjunction with the civil case. It should also be noted that whatever obligation the Government has to protect the public by injunction was not disputed or opposed by these defendants, for they offered to escrow their stock and consented to the maintenance of the *status quo* by agreeing to the continuance of preliminary injunctions" (248 F. Supp. at 201-202).

The Court of Appeals cited *United States* v. *Kordel*, 397 U.S. 1 (1970), for the proposition that the prior civil proceedings did not coerce petitioners unfairly to incriminate themselves and that they must have realized the possibility that criminal proceedings might be contemplated.[26] The Court of Appeals pointedly ignored the SEC's formal disclaimer of the initiation of criminal proceedings. However, in *Kordel*, this Court, by Mr. Justice Stewart, specifically noted that, before interrogatories were answered, the Food and Drug Administration served a notice that a criminal proceeding was contemplated with respect to the transactions that were the subject of the civil action. Unlike *Kordel*, where the civil action involved the

[26] Appendix A, p. 45.

corporation and the criminal action involved the individual, here the civil and criminal actions were directed against the same individuals—a more direct conflict of rights. This Court specifically excluded from the ambit of *Kordel* a case such as the present one:

> "We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution."

Indeed, the teaching of *Kordel* mandates reversal. The present case is one where the civil actions were unnecessary and were brought to obtain evidence for a criminal prosecution; it is one where the defendants were not advised in the civil proceedings that the Government contemplated their criminal prosecution, and, in fact, as the Court of Appeals acknowledged, such information was deliberately withheld from them; and the totality of circumstances suggests not only that petitioners were deprived of due process of law but also of "civilized standards of procedure and evidence." *McNabb* v. *United States*, 318 U.S. 332, 339-341 (1943).[27]

In its brief on appeal, the Government claimed that Judge Gasch's decision in the prior *Parrott* case "has never been followed by any court." This is incorrect. In *United*

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[27] As Judge Gasch noted, "considerations of justice and fair play" are also involved. 248 F. Supp. at 201.

States v. *Rand*, CCH Fed. Sec. L. Rep. ¶92,573 (N.D. Ohio 1/9/70), the Court expressly adopted Judge Gasch's decision in a "remarkably similar" case and rejected the Second Circuit's position. That Court called it "unrealistic to suppose that defendant will be on guard against incriminating himself when he is unaware that criminal proceedings are contemplated." It quoted from the Government's brief on appeal from the Sixth Circuit's decision in *Kordel* to the effect that the Government approved Judge Gasch's decision. The Solicitor General is respectfully invited to reveal to this Court how the Government's acceptance of Judge Gasch's decision in the Sixth Circuit and its rejection by the Government in the Second Circuit can be reconciled.

The Government concealed its prosecutive intentions until the very end so that the Parrotts would have no opportunity to seek relief from the courts by way of postponement of the civil proceedings. It is no answer to say that, just to be cautious the defendant should have availed himself of his right not to incriminate himself, for the Parrotts were never warned of the impending criminal prosecution. If criminal proceedings had been promptly begun, they could have made an intelligent choice and moved for an adjournment of the whole interrogatory and deposition procedure. They were denied those rights. The SEC went ahead and availed itself of the broad discovery techniques of civil litigation in aid of a criminal prosecution. Thus, petitioners' rights under the self-incrimination and due process clauses of the Fifth Amendment were violated. See *United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo. 1963); *United States* v. *Lipshitz*, 132 F. Supp. 519 (E.D. N.Y. 1955).

POINT III

The conviction of Donald Parrott was obtained through guilt by association with his father and employer, in violation of the doctrine of this Court in *Ingram* v. *United States*, 360 U.S. 672 (1959), and on the prosecutor's highly prejudicial summation to the jury.

A. *Guilt by association*

Donald Parrott, who did not testify, was convicted on the only count on which he was tried, the conspiracy count. His name was mentioned by only two out of the 26 Government witnesses. There was not one scintilla of direct proof that he knew the Petron stock was unregistered or had to be registered and no direct proof that he knew anything about allegedly false financial statements. The circumstantial evidence was similarly lacking in substance. In spite of this lack of evidence, the Court of Appeals virtually copied verbatim from the Government's brief on appeal in order to ascribe to Donald Parrott acts as to which there was no proof.[28]

There was evidence that Donald physically delivered certain documents, signed certain checks and deposited certain funds, but only that it was done upon his father's instructions as his father's bookkeeper.[29] Forrest Parrott

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[28] The lack of such proof was spelled out in detail on pages 2-24 of the brief on appeal of Donald Parrott as well as in the petition for rehearing.

[29] The Government did no more "than list a number of presumptively innocent actions." But "an accumulation of nothings is still nothing." *Reiss* v. *United States*, 324 F.2d 680 (1st Cir. 1963), *cert. denied*, *Jacobs* v. *United States*, 376 U.S. 911 (1964). Also see, *United States* v. *Falcone*, 109 F.2d 579 (2d Cir.), affirmed, 311 U.S. 205, 210-211, where this Court said: ". . . one

specifically testified that Donald was only following his instructions (there was no evidence to the contrary) and the acts performed by Donald were consistent with his position as a bookkeeper for his father.

Forrest testified that he himself sold all the Petron shares and that although he had given Donald some shares not later than 1956, Donald had not sold any of such shares and had not benefited from any of Forrest's sales. All of the acts of Donald were only ministerial. The actual sales transactions had been arranged by Forrest. There was absolutely no proof of Donald's individual knowledge of the alleged unlawful nature of any undertaking. There was no proof that he had a stake in the venture, or that any of his actions imported a concert of purpose such as charged in the indictment. The evidence against him consisted of guilt by association, in that the alleged sins of the father were visited upon the son. Inference was piled upon inference and, together with speculation and suspicion, comprised the case against Donald.

The vast bulk of evidence concerned Forrest. Obviously, then, the jury associated father and son without any independent proof against the latter. The notion that guilt of conspiracy can be inferred from association, including family relationship, has been rejected. *Causey* v. *United States*, 352 F.2d 203 (5th Cir. 1965); *Harms* v. *United States*, 272 F.2d 478 (4th Cir. 1959).

This Court was faced with a similar issue in *Ingram* v. *United States*, 360 U.S. 672 (1959). There, the evidence

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who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge."

was held insufficient to sustain the conviction of the employees of the operators of a numbers game for conspiracy to evade wagering taxes. The Government relied, as here, on circumstantial evidence, " . . . simply the intimate connection of Smith and Law with the operation of the lottery itself, their cooperation in conducting it secretly and their apparent knowledge that it was conducted at a profit." But, said this Court, " . . . these circumstances actually are colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes" and "To sustain their conviction on this record would make of the crime of conspiracy just that 'dragnet to draw in all substantive crimes' against which the Court warned in Direct Sales."

The Court of Appeals erroneously stated that Donald "arranged loans" and "worked closely with his father in a one room office." The Court of Appeals also erred in stating that Donald drew a check to inflate Petron's cash account for a fraudulent financial statement and that he "arranged" a check paid to Petron in purchase of some nonexistent debentures. There was evidence that Donald drew a check, but no evidence that it was "to inflate Petron's cash account" for a fraudulent financial statement. There was no evidence that he "arranged" loans; Forrest testified that it was he who did the arranging, and this was verified by Government witness Brehmer. There was no testimony that Donald "arranged a check" to purchase debentures; it was only Forrest who was involved with these debentures. There was no evidence that Donald worked closely with his father in a one room office.

B. *The prejudicial summation*

The Court of Appeals also said that Donald was transfer agent for Petron "during the fantastic rise in the price of Petron stock (until May, 1961) . . . ." This is vitally important because the Government argued that this alone was sufficient to convict Donald. The Court based this conclusion upon the testimony of co-defendant Brehmer, a Government witness who had pled guilty in 1966 and who was awaiting sentencing at the time of his testimony.[30] However, there was absolutely no evidence that Donald *at any time* was the transfer agent of Petron. Brehmer testified only that he believed that Donald delivered the transfer books to him after he had a conversation with Forrest.[31]

Brehmer testified that he believed he became transfer agent for Petron in early May 1961. However, another Government witness had previously stated his belief that Brehmer had been Petron's transfer agent as early as November 1960. The indictment itself alleges that Brehmer dominated and controlled Petron's transfer agent.

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[30] Shortly after the trial, Brehmer unsuccessfully moved to set aside his plea of guilty, and claimed he was innocent and had a defense. He said he cooperated with the Government, *inter alia*, because he thought he could withdraw his guilty plea. None of this was known to petitioners at the trial.

[31] As set forth on p. 642 of the trial transcript, the specific testimony of Brehmer was:

> "Q. Did you have a conversation with Forrest Parrott before that? A. Yes.
>
> Q. What in substance was said? A. Well, he wanted to know if I would like to take over the transfer of the Petron Corporation, and I said I would.
>
> Q. And then did you receive the books? A. Yes, I did.
>
> Q. From whom? A. I believe Donald Parrott delivered them to me."

The error of the Court of Appeals in saying that Brehmer's testimony indicated Donald to be Petron's transfer agent during the rise in the price of Petron's stock is particularly important because the Government, in its summation, emphasized such rise in the price of Petron stock in a two-week period beginning March 15, 1961. Inviting the jury to look at the stock register, which would be found to show hardly any activity in the period in question, the prosecutor described Donald as "the keeper of that very book," who "cannot have failed to notice, as he entered transfers in the registry book, that hardly any shares were ever being transferred." Concluding his passionate summation, the prosecutor said "under these circumstances, Donald Parrott had to know basically that this was a manipulation of the price of the stock and that there was no legitimate demand, no normal demand." Counsel for Donald Parrott then objected "that the register was with Mr. Brehmer."

The Government thus based its argument on facts not in evidence; and it did so in such a prejudicial manner that the jury gave full credence to the prosecutor when, as one of the few exhibits which it requested, it asked the Court for "transfer ledger kept by D. Parrott." The Court of Appeals recognized that the evidence showed that Brehmer signed stock certificates as transfer agent as early as March, 1961;[32] the Court said that the Government did not conceal this evidence. However, the fact is that the Government had in its possession but did not introduce in evidence some 300 to 400 Petron stock certificates signed by Brehmer as transfer agent, 110 of which were dated in February of 1961. It was the affirmative

[32] Actually it is February, 1961.

duty of the Government to introduce these into evidence and not argue to the jury contrary to its own evidence. *Corley* v. *United States,* 365 F.2d 884 (D.C. Cir. 1966).

Additionally, the Government's argument was improper because, even if Donald were transfer agent, this does not mean that he knew the market price of the stock or that there was a manipulation occurring. Yet the Government persisted in making this argument on appeal as it did on its summation.

The Court of Appeals said that "If Donald claims that all he was doing was innocently carrying out the instructions of his father, he could make that argument as a defense. . . ." In effect, the Court is shifting the burden of proof to Donald when it properly should be upon the Government. There was no evidence for Donald to negate.

The question still remained: to what evidence would Donald address this defense? Forrest testified that Donald had been carrying out his instructions as his bookkeeper, and there was no evidence to show that Donald knowingly participated in a conspiracy. In view of the "disfavor" by this Court of "attempts to broaden the already pervasive and wide-spreading nets of conspiracy prosecutions" [*Grunewald* v. *United States,* 353 U.S. 391, 404 (1957)], petitioner Donald Parrott respectfully invites the Solicitor General to point out to this Court in detail the specific evidence which shows that Donald was Petron's transfer agent and that he knowingly participated in a conspiracy. If neither be shown, a confession of error is in order.

POINT IV

As judicial supervisor of the administration of criminal justice in the federal courts, this Court should correct a serious error made by the Court of Appeals as to the admission in evidence of certain letters offered under the business records exception to the hearsay rule, 28 U.S.C. §1732.

There were introduced in evidence through an officer of a Denver bank certain letters purporting to have been written by petitioners, advising the bank that certain trade or nominee names were to be used on stocks. The letters were offered and received, over objection, under the business records or shopbook exception to the hearsay rule (28 U.S.C. §1732). The specific objection of the defense was that, although they had been received by the bank and kept in its files, they had not been prepared or made by any bank personnel, but were only filed by the bank. These letters did not remotely qualify under the shopbook rule or business records exception.

At trial the only showing by the Government in offering them was that they had been in the custody of the bank, and it was the regular course of the bank's business to file them (as presumably it is the bank's regular course of business to file all correspondence). This showing was insufficient. *National Labor Relations Board* v. *Sharples Chemicals,* 209 F.2d 645, 653-654 (6th Cir. 1954); *United States* v. *Sherfey,* 384 F.2d 786, 788 (6th Cir. 1967); *Cromling* v. *Pittsburgh and Lake Erie R.R. Co.,* 327 F.2d 142, 147 (3d Cir. 1963).

Where a document is alleged to be of a particular origin, the authorship must be proved. The mere fact that a letter

is signed in the name of a person is not enough to prove he signed it. *Nicola* v. *United States*, 72 F.2d 780 (3d Cir. 1934); *McGowan* v. *Armour*, 248 Fed. 676, 677 (8th Cir. 1918); *Summers* v. *McDermott*, 136 F.2d 338 (3d Cir. 1943); 7 Wigmore, *Evidence*, §2130 (3d Ed. 1940).

In its opinion, the Court of Appeals stated that petitioners attacked the admission into evidence of "two letters from the Parrotts to a Denver bank which substantiated the proof of a scheme to distribute the Petron stocks through certain nominees."[33] Petitioners' objection that these letters were not authenticated was found by the Court of Appeals to have "some basis." However, no reversible error was found because the Court of Appeals said that "appellants did not object to the introduction of the letters on this ground below when the lack could have been cured and so are barred from claiming this ground on appeal . . . ."[34]

The Court of Appeals was mistaken in saying that no objection was made on the above ground. The objection was made by counsel for Donald Parrott and is stated on page 501 of the stenographer's minutes of the trial. The District Court overruled this objection. In its brief on appeal, the Government admitted the importance of these letters, calling them "an integral part of the Parrotts' scheme . . . ." Further, the Court of Appeals was incorrect in saying there were only two such letters; the actual number was nine.[35]

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[33] See Appendix A, p. 49.

[34] Citing *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966), but ignoring the reference in that case to the inherent and statutory power of the Court of Appeals to notice plain error.

[35] As is evidenced by the Government's affidavit in opposition to the motion to set aside the verdict, to which these letters were annexed.

Petitioners respectfully invite the Solicitor General to examine the transcript and reveal to this Court whether counsel for Donald Parrott made the very objection which the Court of Appeals denied he made. Judicial supervision by this Court of the administration of criminal justice should mandate the admission and correction of this error of the Court of Appeals. *McNabb* v. *United States*, 318 U.S. 332 (1943).

CONCLUSION

For the reasons stated, the writ of certiorari should be granted.

Dated: New York, New York
June 15, 1970

Respectfully submitted,

JEROME J. LONDIN
Counsel for Petitioners

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 527, 528—September Term, 1969.

(Argued March 12, 1970 Decided April 20, 1970.)

Docket Nos. 34168, 34264

UNITED STATES OF AMERICA,

Appellee,

—v.—

FORREST PARROTT and DONALD PARROTT,

Appellants.

Before:

SMITH, KAUFMAN and HAYS,

Circuit Judges.

Appeal from judgments of conviction on trial to the jury in the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge*, on charges of conspiracy to sell unregistered securities, sale of unregistered securities and fraudulent sale of securities, in violation of 15 U.S.C. §77 and 18 U.S.C. §§1341, 1343. Affirmed.

JEROME J. LONDIN, New York, N. Y. (Carro, Spanbock & Londin, New York, N. Y., Allen Green, of counsel), *for Appellant Forrest Parrott.*

ALLEN GREEN, New York, N. Y. (Carro, Spanbock & Londin, New York, N. Y., Jerome J. Londin, of counsel), *for Appellant Donald Parrott.*

JAMES D. ZIRIN, Assistant U. S. Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Paul B. Galvani, Assistant U. S. Attorney, of counsel), *for Appellee.*

SMITH, *Circuit Judge*:

This is an appeal by Forrest and Donald Parrott from conviction for conspiracy to sell unregistered securities and of Forrest for sale of unregistered securities and fraudulent sale of securities. Appellants Forrest and Donald Parrott are father and son respectively. Donald was tried only on the conspiracy count (count one) (counts 12-30 charging him with substantive offenses were severed), and Forrest was tried on the conspiracy count and various substantive counts of selling and aiding others to sell unregistered securities and to sell securities by fraud, in violation of sections 5 and 17 of the Securities Act of 1933, 15 U.S.C. §77. The conspiracy count also cited violations of the mail fraud statute, 18 U.S.C. §§1341, 1343. Appellants were tried before Judge Weinfeld and a jury in the Southern District of New York and were found guilty on all counts on which they were tried; judgment was entered October 8, 1969. Forrest was fined a total of $10,000, was given three-year concurrent suspended sentences (and one year probation). Donald was fined $1,000, imposition of sentence of imprisonment was suspended, and he was placed on probation for one day. We find no error and affirm the convictions.

Evidence was presented that Forrest Parrott owned a series of companies through a parent corporation, Ampet. In 1960 he apparently decided to revitalize a dormant subsidiary, Uranium Industries, Inc. He acquired a new president (one Vance) and purchased several properties and options with stock from the dormant company. The name of Uranium was changed to Petron and a false financial statement was drawn up by Forrest and his accountant. Donald Parrott managed to acquire cash for the company to match the overstated cash account, and arranged for loans to cover an acquisition by Petron from another Parrott company. Forrest master-minded a widespread distribution of the Petron shares to the public by selling shares held by his nominees through selected brokerage houses which employed boiler room tactics and received kickbacks for selling the unregistered securities.

Appellants raise a number of alleged errors on this appeal of which two are the most troublesome.

First, appellants contend that they were denied a speedy trial in violation of their sixth amendment rights, fifth amendment right to due process, and their rights secured by Fed. R. Crim. P. Rule 48. The government apparently began its investigation of the Petron stock affair as early as January, 1962 and by March of that year the SEC had instituted a civil action in Colorado in regard to the transactions here found to have been criminal. A criminal reference report was sent to the Justice Department and the U. S. Attorney in Washington, D. C. in November, 1962 in connection with the sales of stock of the Hydramotive Corporation in a similar scheme. This ultimately led to an indictment in Washington which was dismissed in the district court because of the long delay (indictment there was returned in late 1964) and due to the prejudice of eliciting information in prior civil proceedings. *United States* v.

Parrott, 248 F. Supp. 196 (D.D.C. 1965). A criminal reference report was made as to the instant Petron transactions at the latest in July, 1963. The indictment in the present case was not sought in the Southern District of New York until January, 1966 and was not returned by the grand jury until March, 1966. [The present indictment was not sought until after the Washington, D. C. indictment was dismissed by the district court in December, 1965 and shortly before it was decided that the appeal of the dismissal should be dropped on recommendation of the Solicitor General.] During all this time, the government, through the SEC and officials of the Justice Department, was proceeding actively against the Parrotts and others in regard to the incidents here involved and closely related matters: (1) an SEC action against Hydramotive in Oklahoma, and (2) an action to revoke the broker's license of Raleigh, a broker-dealer controlled by Forrest Parrott, in Colorado. In these actions the SEC sought extensive discovery under the rules of civil procedure and in one case forced the Parrotts to attend a hearing in 1964 under a court order of contempt.

There is no question that there was quite a long pre-indictment delay (at the very least, almost three years from the criminal reference report in 1963 till the indictment in 1966). The government's justification is that it was tied up with other cases and that preparation here was time consuming. The government argues that this delay does not therefore require the dismissal of the indictment on these two grounds: First, the Parrotts brought on the pre-indictment delay themselves by vigorously opposing the SEC civil actions to the point of requiring the use of contempt as a means of requiring co-operation. Second, the complex nature of the criminal deeds of the Parrotts required time to unwind so that a criminal reference report

was not possible until July, 1963. Moreover, the government contends that the Parrotts were not prejudiced by the delay since the government's case was based largely on documentary evidence, that the witnesses who died in the interim could only have offered hearsay testimony or could have been deposed by defendants prior to their deaths (and in some cases the witnesses had been deposed by the government in connection with the civil cases and the defendants had not participated by their own choice). The court below found that there was no plan to delay or harm the defense.

The first reason is of dubious force. A possible criminal defendant might well have lawfully been even less cooperative, for instance, by invoking his rights against self-incrimination.

The second reason carries more weight. Any delay in bringing criminal charges creates a possibility of hindrance to the development of the facts on trial by the demise of witnesses and dimming of memories. However, time is needed for investigation and determination of the need for and extent of criminal charges to be brought, particularly in wide-ranging securities distribution schemes. This is recognized by the Congress in the statute of limitations, to which we normally look to determine the period open to the prosecution to bring its formal accusations. "Where there has been a pre-arrest delay the statute of limitations is 'usually considered the primary guarantee against bringing overly stale criminal charges' *United States* v. *Ewell*, 383 U.S. 116, 122, 86 S. Ct. 773, 15 L. Ed.2d 627 (1966)." *United States* v. *Feinberg*, 383 F.2d 60, 64 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968); *Hoopengarner* v. *United States*, 270 F.2d 465 (6 Cir. 1959).

Of course, even though prejudice is not presumed from pre-arrest delay within the statutory period, a due process

question may arise if the ability of the defendant to prepare his defense is impaired by the delay. *United States* v. *Feinberg*, 383 F.2d 60, 65 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968). Judge Weinfeld found no such impairment, and we agree that none was established here. Appellants point to the deaths of prospective witnesses Bane and Peavey who might have testified to legal advice given the Parrotts or other matters bearing on intent. But these witnesses became unavailable very shortly after the events and long before any realistic trial date, as pointed out by Judge Gasch in the *Hydramotive* case. *United States* v. *Parrott*, 248 F. Supp. 196, 204 n. 43 (D.C. Cir. 1965).[1] The pre-indictment delay had no effect on their availability. Nor was there any convincing showing of other prejudice as by failing memory of the Parrotts. The claimed memory impairment of Forrest Parrott, the sole defense witness, was quite selective. The government case was strongly based on documentary proof. We cannot say that Judge Weinfeld was clearly erroneous, or indeed not justified in the finding of lack of prejudice.

Appellants rely also on post-indictment delay in the case. This claim must be held to have been waived, however, for not only was there no demand for speedy trial, which is required, see *United States* v. *Lustman*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958), *United States* v. *Roberts*, 408 F.2d 360 (2d Cir. 1969) (per curiam) but here the Parrotts agreed that the case be taken off the trial calendar in 1967.

The claim that pressing the civil proceedings while allegedly concealing the intent to prosecute criminally

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1 The lawyer on whose advice Parrott claimed to have relied in the Hydramotive promotion, one Heidenrich, would have been available at a reasonably prompt trial, which led to the ruling that the delay there was prejudicial.

was unfair has considerable appeal. However, the Parrotts could have exercised their privilege against self-incrimination in the civil proceedings; thus the prior civil proceedings did not coerce appellants unfairly to incriminate themselves. *United States* v. *Kordel*, 90 S. Ct. 763 (Feb. 24, 1970). Moreover, the testimony of the Parrotts in earlier proceedings was not used by the government in its case in chief or in cross-examination of Forrest Parrott, the sole defense witness. And the record shows advice of counsel and warnings in some of these proceedings, which indeed we have intimated in *United States* v. *Light*, 394 F.2d 908, 914 (2d Cir. 1968) may be unnecessary in view of the plain implications of the statute.

At one of the civil proceedings the government declined to state the identity of one who conferred at counsel table with SEC personnel, who appears to have been a government attorney assigned to preparation of criminal charges. See *United States* v. *Parrott*, *supra*, 248 F. Supp. at 199. It is incomprehensible to us why such cloak and dagger games should be played by the prosecution, jeopardizing years of work without any discernible reason. Yet the very asking of the question would seem to show an awareness that more than civil proceedings might be contemplated, and in any case counsel surely must have realized such a possibility here. See *United States* v. *Kordel*, *supra*, 90 S. Ct. at 763 and n. 24.

The remaining contentions of the appellants have little merit. They contend that the charge as to the applicability of Regulation A was erroneous. The charge instructed the jury that the regulation was inapplicable here. Appellants say that the charge should have enumerated the bases for the applicability and told the jury that the government had the burden to overcome or prove that it was inapplicable.

But here there was no basis for any application of the regulation and had the jury found it to be applicable the verdict would have been incredible. A sale of shares in 1954 which was exempted by Regulation A does not forever exempt those securities from regulation. Even if it did, the appellants put in no evidence that they had sold the shares in compliance with their allegedly exempt status (they did not send the 1954 offering circulars with the current sales confirmations, nor did they update the original offering circular after 9 months had passed).

Next, they make a similar claim as to the applicability of Rule 154, 17 C.F.R. §230.154, about which the charge simply instructed that this defense was inapplicable. The only evidence in the case showed that appellants were actively distributing the shares of Petron through various security brokers (they did not contest the distribution) and the rule only applies to unsolicited offers to buy. There is also some doubt that the appellants were selling only 1% of the outstanding shares within any 6 months (which is a prerequisite of the rule).

The charge as to the holding of securities more than 6 months to one year was that this holding in itself does not entitle one not to register the securities if registration is otherwise required. That is correct. If the appellants wanted to argue that the SEC practice was not to require stock held that long to be registered, they could have made this argument to the jury for whatever relevance they thought it had to the criminal prosecution (perhaps as to their criminal intent).

Next they attack the charge for having explained the purpose of the Securities Act: to protect the investing public from fraudulent practices. The argument is that the jurors might feel that the statute was designed to protect them as investors and that therefore they had a

personal interest in convicting the appellants. This argument has little substance. Many statutes protect the general public and yet juries are able to disassociate their personal interest as members of the public from their determinations of guilt and innocence (e.g., the law against murder and rape). In any case, the charge as to the purpose of the statute was useful to give the statute some coherence in the eyes of the jury which may not have been fully informed as to the meaning of the securities laws.

Appellants next contend that the reading of the indictment as part of the charge was boring to the jury and prejudicial to the appellants. There is nothing in this claim. See *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965); *cert. denied*, 384 U.S. 947 (1966).

While the jury was deliberating they sent a note requesting the stock transfer ledger kept by Donald. There was some evidence at trial (namely, Brehmer's testimony) indicating that Donald kept the Petron transfer ledger until May, 1961 when Brehmer took over. Appellants asked that the ledger be divided into the part kept by Donald and the part kept by Brehmer before sending the jury only the former part. The judge denied this request. An hour later the appellants' counsel requested that the jury be instructed that Donald may not have kept the entire record in the ledgers, and an agreed note was prepared and sent to the jury. This was the first time that appellants' counsel stressed that Donald may not have kept the ledgers between February and May, 1961, and there had been no objection to the charge that the government contended that Brehmer took over in May, 1961. If the defense wanted other evidence to be considered by the jury as to the date of takeover by Brehmer, they should have stressed this evidence in trial testimony and in their summations. While we disapprove the sending in of a written note to the jury

rather than calling the jury into open court for oral instruction, see *United States v. Schor*, 418 F.2d 26 (2d Cir. 1969), no prejudice appears and appellants agreed to the method used. We find no reversible error here.

Donald argues that there was insufficient evidence to convict him. There was evidence that he drew a check to inflate Petron's cash account for the fraudulent financial statement; that he arranged loans to cover Petron's acquisitions of properties which were overstated on the financial report; that he arranged a check paid to Petron in purchase of some nonexistent debentures; that he was transfer agent for Petron during the fantastic rise in the price of Petron stock (until May, 1961), and that he worked closely with his father in a one-room office and was integrally tied up in his affairs. If Donald claims that all he was doing was innocently carrying out the instructions of his father, he could make that argument as a defense (that he had no evil intent). But there is sufficient evidence here to reject such a contention and hence the case was properly submitted to the jury and its verdict was properly based on the evidence.

Donald contends that the government's summation was improper and based on false evidence when it contended that Brehmer took over the transfer ledgers in May, 1961. He shows evidence which was admitted which shows that Brehmer signed stock transfers as early as March, 1961. The government, however, did not conceal this evidence since it was admitted and available to all. Its summation was based on the only testimony bearing on when Brehmer took over, to wit, Brehmer's oral testimony. There is nothing improper about such a summation.

Next appellants argue that Brehmer's post-trial motion to set aside his guilty plea on the grounds that at the time

he pled he thought he had a promise of getting at most a suspended sentence, invalidates his trial testimony that he had not been promised anything for his testimony. At trial appellants did not attack this testimony or cross-examine to try to show that Brehmer's credibility might be weak due to possible promises. Brehmer's post-trial motion was held to be frivolous by Judge Weinfeld, and since it is based on his self-serving allegations about what he had thought, it is not enough seriously to put in question the veracity of his trial testimony that he had not been promised anything.

Next appellants attack the admission into evidence of two letters from the Parrotts to a Denver bank which substantiated the proof of a scheme to distribute the Petron stocks through certain nominees. They claim that the letters were not authenticated, and the fact that the bank filed the letters after receipt in the ordinary course of their business does not give the letters the necessary authentication that they came from the Parrotts in order to make them admissible as evidence. This argument has some basis. But the appellants did not object to the introduction of the letters on this ground below when the lack could have been cured and so are barred from claiming this ground on appeal. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

We have considered the other arguments advanced by appellants and find no grounds for reversal. Judgment affirmed.

APPENDIX B

Order of the United States Court of Appeals

34168, 34264

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

FORREST PARROTT, *et al.,*

Defendants,

FORREST PARROTT and DONALD PARROTT,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is

Denied.

/s/ J. JOSEPH SMITH
J. Joseph Smith

/s/ IRVING R. KAUFMAN
Irving R. Kaufman

/s/ PAUL R. HAYS
Paul R. Hays
Circuit Judges

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 31 1970
E. ROBERT SEAVER, CLERK

No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1970

DONALD PARROTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILLIAM D. RUCKELSHAUS,
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United States v. Terrill, 383 U.S. 116

United States v. Feinberg, 383 F. 2d 60, certiorari denied, 389 U.S. 1044

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United States v. Parrott, 248 F. Supp. 196

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28 U.S.C. 1732

Fed. R. Crim. P. 43

398-659 70 - 1

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OCTOBER TERM, 1970

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1970. A petition for rehearing was denied on May 19, 1970. The petition for a writ of certiorari was filed on June 17, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed because of delays occurring prior and subsequent to its return.

2. Whether criminal proceedings were barred because the Securities and Exchange Commission had conducted parallel civil proceedings which had concluded before indictment.

3. Whether the evidence was sufficient to support Donald Parrott's conviction for conspiracy.

4. Whether the admission of certain letters in evidence requires reversal.

STATEMENT

A 77-count indictment filed on March 10, 1966, in the United States District Court for the Southern District of New York charged Forrest Parrott, his son Donald Parrott, and eight others with conspiracy to violate the mail fraud statute and Sections 5 and 17 of the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and 76 substantive counts, all relating to unlawful sales of stock not registered with the Securities and Exchange Commission. Both Forrest and Donald Parrott were tried on the conspiracy count; in addition, Forrest Parrott was tried on twelve substantive counts. The jury convicted both as charged. On October 15, 1969, Forrest Parrott was fined $10,000 and received a suspended sentence of three years' imprisonment with probation for one year; Donald Parrott was fined $1,000, and the imposition of any prison sentence was suspended, with probation for one day.

[1] Five of the co-defendants pleaded guilty prior to trial and three of them (Breitner, Nadich and Levinson) testified for the government. Another co-defendant, Benjamin Cohan, was tried jointly with petitioners and acquitted. The remaining co-defendants have not yet been tried.

The court of appeals affirmed (Pet. App. A). Forrest Parrott, although ostensibly joined in the present petition, died before it was filed. (Pet. 15).

The evidence showed that in 1956 Forrest Parrott and codefendant Alfred Brehmer formed Ampet Corporation, the eventual parent of numerous other corporations (Tr. 636). Of the 5,000 shares of Ampet issued, 3,500 were controlled by Forrest Parrott.[2] Thereafter, Ampet acquired 10,000,000 shares of Uranium Industries, Inc.,[3] a dormant corporation founded by Forrest Parrott in 1954 (Tr. 639, 1559–1560). Brehmer, an accountant, became an officer of Ampet at Forrest Parrott's suggestion, and also resumed accounting work for Uranium Industries (Tr. 636, 640).

In 1960, Forrest and Donald Parrott, then residing in the Denver, Colorado area, renewed their acquaintance with Leland S. Vance, a former neighbor in Oklahoma City, who had moved to Denver. Vance had relatives and friends who held highly responsible positions with the Sinclair Oil Corporation (Tr. 180). He told the Parrotts that he was interested in forming a corporation to conduct his own oil and gas ventures. Forrest Parrott told Vance that he knew of a dormant corporation (Uranium Industries) which could be restored and used to achieve Vance's purposes (Tr. 78). In January, 1961, Vance became president of Uranium Industries, receiving 1,000,000 shares of the stock of that company from Forrest Parrott, who told

[2] The nominal owner of the shares was Forrest Parrott's daughter, who took no part in Ampet's operations (Tr. 638).

[3] Uranium Industries had a total of 10,450,000 shares outstanding (Tr. 639).

him not to worry about control of the corporation (Tr. 80–81). Shortly thereafter, the name of Uranium Industries was changed to Petron.

At its inception Petron had two assets, an inoperative uranium mine in Utah and a waterflood oil project in Oklahoma from which no income was derived (Tr. 119–120, 122) and which had been acquired from another Parrott company, Namsa Oils Ltd. (Tr. 97A, 642–643). In addition, Petron owned an option, purchased from Namsa for 2,000,000 shares, to buy a coal mine in Utah, and another option, purchased from Forrest Parrott for ten dollars, on a gas field in Oklahoma (Tr. 107–108, 123–124).

After three months of operation Vance decided that a quarterly report and financial statement should be prepared and sent to Petron's 150 stockholders (Tr. 98–100). Forrest and Donald Parrott took steps to present an inflated portrait of Petron's financial condition in these statements. In order to raise the amount of cash reflected on the balance sheet, Donald Parrott drew a check on the Namsa Oils account for $25,000, payable to Petron (Gov't. Exh. 73). The check was dated May 8, 1961, and deposited May 11; nevertheless it was included as a current asset on the date of the balance sheet, April 10, 1961 (Tr. 656–657). Forrest Parrott told co-defendant Brehmer, who was responsible for the accounting work, that Namsa would buy $25,000 in debentures to be issued by Petron. The debentures were never issued, although the financial statement described them in detail (Tr. 658–659). The total cash figure, including the advance from Namsa, was stated in the balance sheet as

$26,757.61 (Tr. 656). The inoperative uranium mine, and the unprofitable oil field project were listed at excessive values—the latter at $439,491.89, although its book value was less than $2,800 (Tr. 675–677). The coal mine property was valued at $69,300,000, using an unacceptable and incorrect method of valuation (Tr. 4007–4008). In fact the coal property was never owned by Petron. The price to exercise the option on the property was originally $1,500,000, but after certain assignments of the option by Forrest and Donald Parrott within the myriad Parrott-controlled corporations, the exercise price was increased to $3,150,000, of which $1,650,000 was to be in cash (Tr. 445, 107–115, 427). When Vance inquired how Petron, with its limited cash position, could ever exercise the option, Forrest Parrott referred to a large banking house in the eastern United States, unnamed, which he said would finance the purchase (Tr. 116). The option was never exercised and within a few years the mines were shut down as unprofitable (Tr. 444). The final asset, the option to buy a gas field for $275,000, was valued at $800,000. Once again Forrest Parrott spoke of financing the purchase through the sale of debentures (Tr. 123–125). The gas wells on this property had remained shut for lack of a market. Forrest Parrott told Vance that a pipeline could be constructed to effect a market, but the stated asset value did not reflect the cost of such a pipeline (Tr. 126–128). Moreover, no financing commitments for this or any other Petron project were ever obtained (Tr. 689).

Using the inflated figures, the Parrotts were able to conceal the fact that Petron had suffered a loss of

over $44,000 in the first quarter of 1961, and had an accumulated loss of $174,729.02 (Tr. 692, 1716–1727). Instead, a profit of 57 cents per share was reported, and the quarterly report boasted that Petron would soon be a hundred million dollar company (Tr. 103, 107, Gov't. Exh. 2). All of the figures used in the reports were furnished by Forrest Parrott (Tr. 678, 685–686). The description of the corporate structure in the financial reports, listing five separate departments actively engaged in profitable ventures, was misleading (Tr. 129–130).

Armed with the false financial reports of Petron's condition, Forrest Parrott attempted to create a public market for its shares, none of which had been registered with the Securities and Exchange Commission. He spoke with several over-the-counter stock brokers, primarily in New York City, and made arrangements for them to receive kickbacks for all shares of Petron marketed by them (Tr. 1097–1134). He furnished these brokers with copies of the financial statement which they in turn distributed to potential customers (Tr. 92, 1095, 1176–1180). The brokers also passed on Forrest Parrott's representation that Petron's management was interrelated with Sinclair Oil (Tr. 1099–1100). The stock being sold came from sources controlled by Forrest Parrott (Tr.

One broker who did not share in the kickback scheme nevertheless dealt in Petron shares under an agreement with Forrest Parrott that for each share sold by him, Forrest Parrott would deduct 25 cents from an amount owed by the broker's son to a corporation controlled by Parrott (Tr. 825–826). Under the terms of this agreement the broker was able to reduce the $2,500 loan by approximately $800 (Tr. 836, 861).

252, 256, 261). Its price rose considerably while the brokers aggressively persuaded customers to make purchases. In one two-week period the price advanced from 2⅞ to 6⅛. The proceeds of some sales made during this time were used by Donald Parrott to cover the May 8th check drawn on Nansa Oils Ltd. to inflate the Petron cash position (Tr. 660–666, Gov't. Exh. 263).

ARGUMENT

We have been informed that Forrest Parrott died on May 17, 1970, one month prior to the filing of the instant petition for a writ of certiorari (Pet. 15). The death of Forrest Parrott abates his appeal. *Wickel* v. *Ohio*, 371 U.S. 62; *Stager* v. *United States*, 323 U.S. 338, 346. Accordingly, the government's response will confine itself to the manner in which the issues presented affect Donald Parrott.

I. The claim that the indictment should have been dismissed because of pre-indictment and post-indictment delay has been treated at length in the opinions of the court of appeals (Pet. App. 41–45) and the district court (R. 58, 116).* As the lower courts noted, the incidents underlying the conviction occurred in mid-1961. By March 1962, the Securities and Exchange

*The materials which have been filed with the Clerk, other than the trial transcript, are designated "R." R. 58 contains the pre-trial opinion of Judge Bonsal, dated February 14, 1969, denying petitioner's motion to dismiss. R. 116 contains the transcript of the post-trial opinion delivered orally by Judge Weinfeld (who presided at trial) dated October 8, 1969.

Commission had begun its civil investigation, resulting in a criminal reference report prepared in July 1963. By this time three of the six individuals whom petitioner characterizes as crucial to the defense had died, and another died shortly thereafter (Pet. 12–13): their death at this early stage can hardly serve to support dismissal of the indictment.[6] On at least three occasions in 1964 and 1965 the SEC pressed the United States Attorney's Office for initiation of criminal charges. However, it appears that the Assistants assigned to this complex, time-consuming case were also involved in more urgent matters, involving prosecutions and indictments in cases where the statute of limitations was about to run.[7] Thus, the indictment was not filed until March 1966, following presentation to the grand jury in the latter part of 1965. In the meantime, three related SEC civil investigations had taken place, and a criminal action in the

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[6] Indeed, the evidence at trial shows that Mr. Peavey, Forrest Parrott's lawyer, was incapacitated from a stroke suffered in early 1961, and never resumed his practice thereafter (Tr. 902–904). His role in the incidents giving rise to the criminal offenses could not have been critical.

Moreover, we cannot truly believe that Mr. Bane, whom petitioner terms "one of the foremost experts in the securities field," (Pet. 12), would have testified that Forrest Parrott was not a controlling person behind the use of corporate nominees. As to the other deceased potential witnesses, we note the essentially hearsay nature of much of their proposed testimony.

[7] The Assistant United States Attorneys have filed affidavits containing a chronology of their work schedule for the pertinent period, showing heavy overtime schedules and almost no vacations (U.S. Aff. K, L). *See Dickey v. Florida*, No. 728, O.T. 1969, decided May 25, 1970 (slip opinion, p. 8).

District of Columbia paralleling one of the three had terminated favorably to the Parrotts. *United States v. Parrott*, 248 F. Supp. 196.

Three months after the present indictment was filed Forrest Parrott submitted a motion to dismiss for unnecessary delay, in which he also requested additional time to submit more information. On August 23, 1966, Forrest and Donald Parrott filed motions for discovery. On September 6, 1966, Donald Parrott filed a motion to dismiss, citing as his reasons generally the same matters presented to this Court: that the government had unfairly derived information from its broad discovery powers in civil proceedings before the Securities and Exchange Commission; that crucial witnesses had died; that other witnesses had failing memories; and that he was undergoing great financial and personal hardships. A hearing on the motion for discovery was conducted on September 13, 1966, resulting in a court order, dated September 20, granting some of the matters requested. The hearing on the motions to dismiss was adjourned continuously, first to October 10th, and then to November 7th, January 10, 1967, and February 20, 1967, to enable defense counsel to file supplementary affidavits based upon the discovery materials. On February 20, no affidavits had yet been filed. The Assistant United States Attorney and counsel for both Parrotts then agreed that the case could be marked off the court calendar and would be restored as soon as the Assistant was notified that counsel was prepared to proceed.

On January 10, 1968, the government counsel who eventually served as prosecutor was first assigned responsibility for this case. On several occasions he inquired of defense counsel when the supplementary affidavits would be filed, but received no response. It appears that petitioner Donald Parrott had on at least five occasions instructed his counsel not to file such matters, evidently preferring the status quo (R. 43, p. 8; Exh. B). He so informed the court by letter on October 2, 1968, after government counsel had restored the case to the criminal calendar.

On October 14, 1968, government counsel filed an affidavit detailing the events which had theretofore transpired (R. 43). The government then averred that the original source of all evidence which would be introduced at trial was not from information gathered by the Securities and Exchange Commission in the three related civil litigations in which [illegible] and Donald Parrott were concerned. At a hearing before Judge Bonsal on November 12, 1968, the intention not to use materials gathered from petitioner or his father in the civil proceedings was reiterated (R. 58, p. 67). Judge Bonsal's decision denying several motions, including the motion to dismiss, was filed on February 14, 1969. Further delay ensued because of Donald Parrott's

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Donald Parrott and his original counsel, Mr. Cannie, began to disagree on how to proceed, leading to the attorney filing a motion to the court to be relieved. It was at a hearing on this motion, on March 24, 1969, that Judge Wyatt made the comment cited by petitioner to the effect that this case was a disgrace because it had been delayed so long (Pet. 11, R. 45, p. 5). Judge Wyatt thereafter denied counsel's motion to be relieved of his duties.

conflicts with his counsel and because Forrest Parrott informed the court of his own desire to retain new counsel (R. 47, 48, 49). On the eve of trial, Donald Parrott's counsel filed a motion to suppress statements made by him to the Securities and Exchange Commission. The motion was denied on May 14, 1969 as untimely and without foundation, and because the government has long since stated it would not use the materials. Trial finally occurred in June 1969.

As this chronology illustrates, any delay charged to the government was not deliberate or oppressive. The claims regarding the deceased witnesses are, in the words of Judge Weinfeld, "highly exaggerated" (R. 116, p. 4). Moreover, the case rested in large measure on documents equally available to the government and defense counsel. The suggestion that memories of witnesses were impaired finds no support in the trial transcript. In these circumstances, the denial of the motion to dismiss on grounds of due process, speedy trial, or Fed. R. Crim. P. 48, was justified. *United States* v. *Ewell*, 383 U.S. 116; *United States* v. *Feinberg*, 383 F. 2d 60 (C.A. 2), certiorari denied, 389 U.S. 1044.[9]

2. Petitioner and his father were involved in three contemporaneous investigations by the SEC into possible civil violations of the securities laws. All

[9] *Dickey* v. *Florida*, decided May 25, 1970 (No. 758, O.T. 1969), is clearly distinguishable. That case involved the failure of the State over an 8-year period to make any effort to obtain the defendant from federal custody for trial on State charges, despite repeated demands for such a trial. The Court found no valid reason for the delay and consequent prejudice to the accused.

occurred before the institution of these criminal proceedings. When petitioner was called upon to testify at the civil proceedings he was represented by counsel and informed of his right to remain silent. None of his civil testimony was used in the criminal case.

Petitioner's decision to testify before the Securities and Exchange Commission hearings did not bestow upon him an immunity from criminal prosecution. The government did not represent that criminal prosecution had been ruled out. The SEC hearings were not disguises for securing evidence to be used against petitioner in a prospective criminal trial. Accordingly, the courts below properly ruled that criminal proceedings against petitioner were not barred because of parallel civil proceedings. See *United States* v. *Kordel*, 397 U.S. 1.[10]

3. The evidence detailed in the Statement, *supra*, was ample to support the conviction of petitioner Donald Parrott. He served in his father's enterprises not as a mere errand boy with no responsibility for his acts, but as an active participant in the wrong-

[10] Petitioner relies heavily upon a 1965 decision by Judge Gasch in the District Court for the District of Columbia holding that under the circumstances therein presented, the preference given to civil proceedings, and thereby delaying the criminal case, was prejudicial to the accused. *United States* v. *Parrott*, 248 F. Supp. 196. That case is not necessarily indistinguishable from the situation presented here, where no material prejudice arising from the delay has been established. In any event, Judge Gasch's opinion fails to cite any authority for his ruling and no appellate court has ever adopted it. See *United States* v. *Squeri*, 398 F. 2d 785, 788 (C.A. 2); *United States* v. *Silafani*, 263 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918. The government did not concede the correctness of Judge Gasch's ruling in its brief in *Kordel* (No. 87, O.T., 1969, p. 32).

doings. This is well established by the evidence that both Forrest and Donald Parrott executed the signature card authorizing either to sign checks on the Canadian Bank account of Namsa Oils, Ltd. (Tr. 482). In May of 1961, Donald wrote a $25,000 check for Namsa Oils as part of the scheme to inflate the cash position of Petron reflected on the quarterly report, issued before that date. He later arranged for a second check, in the amount of $15,000, to be issued by Namsa for Petron. The checks were covered by the proceeds derived from the sale by Namsa of Petron stock at inflated prices. Donald Parrott then arranged to have Namsa repaid by Petron, which borrowed the funds from a Denver bank, using as collateral a time deposit certificate in the amount of $43,000 drawn to another nominal corporation, United Oil, and signed by Donald Parrott (Tr. 518–519). It is hardly credible that someone in Donald Parrott's position, with responsibility for handling such large sums from the accounts of his father's corporation, would not have the business sense to recognize the purpose for the belated advance to Petron. Moreover, petitioner must have been aware of the manner in which funds were secured to cover the amounts of the checks issued on the Namsa account.

4. At trial, an official of the bank in Denver which had dealings with Forrest and Donald Parrott and some of their nominees was asked to identify nine letters kept by the bank bearing the signatures of either petitioner and the handwritten signature of the nominee, and instructing the bank to guarantee

endorsements written in the signature of the nominee as listed. These letters were not admitted to prove the truth of the matter stated therein; accordingly, any objection based on hearsay is without foundation. See *Phillip* v. *United States*, 356 F. 2d 297 (C.A. 9), certiorari denied *sub nom. Walker* v. *United States*, 384 U.S. 952. Moreover, as the record shows (Tr. 498–501), with one possible exception (Gov't. Exh. 181 B), the objections made by counsel to the admission of the letters were not on the basis now urged—that they had been received but not prepared by the bank, and therefore were not admissible under the federal business records statute, 28 U.S.C. 1732. No objection founded specifically on authenticity of the signatures was raised. In these circumstances, the request by petitioner that this Court invoke its supervisory powers to correct "serious" errors made by the court of appeals in discussing admissibility of the letters is hardly warranted. See *United States* v. *Kelly*, 349 F. 2d 720, 772 (C.A. 2), certiorari denied, 384 U.S. 917.

CONCLUSION

For the reasons stated, it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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